DNRC SUPPLEMENTAL APPROPRIATION REQUEST

A Report Prepared for the

Legislative Finance Committee

By

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STATUTORY REQUIREMENTS

In accordance with 17-7-301, MCA, the Governor has submitted a potential transfer of appropriation from fiscal 2003 to fiscal 2002 to the Legislative Finance Committee (LFC) for comment and report. It is the obligation of the LFC to report to the Governor whether, in the committee's view, the request meets statutory criteria and to raise any necessary compliance issues. If the LFC does not provide a report, the Governor (or other approving authority) can authorize the transfer 90 days after the date the request was forwarded to the committee. The LFC does not approve or deny the requests.

Statute requires two things before a request to move authority from the second year of the biennium to the first can be made:

1) expenditures must be for an "unforeseen and unanticipated emergency" that causes the appropriation for the year to be insufficient for the operation and maintenance of the agency in that year; and
2) the requesting agency must present a plan for reducing expenditures in the second year of the biennium that "allows the agency to contain expenditures within appropriations." Several exceptions to this requirement exist, including an unforeseen and unanticipated emergency for fire suppression.

SUPPLEMENTAL APPROPRIATION REQUEST

The Department of Natural Resources and Conservation is requesting a $3.5 million transfer of authority for known fiscal 2002 wildfire costs. This is a request to transfer state special revenue appropriation authority from four funds within the Forestry Program in fiscal 2003 to the current fiscal year. Since these funds lack sufficient cash to meet obligations, the Department of Administration will approve a general fund loan for $3.5 million. If approved by the Governor, this cash will be placed into the four state special revenue funds and spent for fire suppression costs. Next session, the legislature will be asked in the supplemental bill to increase fiscal 2003 authority by at least the transferred amount. At that time, the general fund loan will be repaid.

The legislature usually does not appropriate any funds to suppress fires (other than personal services appropriated for other purposes but spent on fire suppression), but pays for the costs through the supplemental appropriation process. The department's request consists of the following wildfire costs:

Table 1
Department of Natural Resources and Conservation
June 2002 Supplemental Appropriation Request

PART 1:			
FY 2002 ACTUAL & ESTIMATED FIRE COSTS			
Actual State Protection Costs as of May 6, 2002	$8,545,277		
U.S. Forest Service/BLM Final Bill	6,425,175		
Estimated Fall 2001/Spring 2002 Fire Costs	500,000		
DNRC Budgeted Cost	(151,798)		
PAID & ANTICIPATED OBLIGATIONS		$15,318,654	
PART 2:			
COSTS COVERED BY OTHER SOURCES			
GOVERNOR'S EMERGENCY FUND ADVANCE	(6,700,000)		
SUPPLEMENTAL APPROPRIATION BCD #FS052	(2,000,000)		
Total Cost Covered by Other Sources		(8,700,000)	
Estimate of Unpaid Balance		$6,618,654	
PART 3:			
SUPPLEMENTAL APPROPRIATION			
Estimate of Unpaid Balance		$6,618,654	
Reimbursement from Other States		($3,096,888)	
SUPPLEMENTAL APPROPRIATION REQUEST			$3,521,766

Part 1 of the table shows total estimated costs for state-responsibility fires, including the anticipated bill from the federal government for assistance in fighting Montana fires. The department must: 1) pay $8.5 million to cover actual state protection costs as of May 6, 2002; 2) pay an estimated $6.4 million to federal agencies for costs billed for fighting state fires; 3) set aside an estimated $0.5 million for anticipated Spring 2002 wildfire costs; and 4) deduct $0.2 million for personnel costs that had been budgeted in HB 2. These calculations bring the cost of fire suppression to approximately $15.3 million.

Part 2 shows those portions of the cost that have been covered by non-DNRC funds such as the Governor’s emergency fund. So far, the department has utilized $6.7 million from the Governor’s emergency fund and received a $2.0 million fire supplemental appropriation in March 2002.

Part 3 shows how the supplemental appropriation request has been calculated. The estimated remaining balance for fiscal 2002 fire costs is shown. Approximately $3.1 million in reimbursements from other states for Montana’s assistance in fighting their fires will be added back to the Governor's emergency fund and then utilized to pay for qualifying suppression expenses. Thus, as shown, $3.1 million is subtracted from the unpaid fire cost balance to arrive at an approximate $3.5 million of fire costs that remain.

LFD ISSUE

LFD staff has identified several problems with the mechanism which the Office of Budget and Program Planning (OBPP) is using to obtain cash and authority to pay fiscal 2002 fire costs.

1) Language placed in HB2 at the request of DNRC does not appear to be valid as it attempts to override substantive law
2) Statutory restrictions prevent proposed funding sources from being used to pay for fire costs
3) An Attorney General's opinion appears to eliminate the possibility of a general fund loan because repayment is based upon a supplemental appropriation

Staff has obtained a legal opinion[1] from Mr. Greg Petesch, the Legislative Branch Legal Services Director, regarding the above issues.

Language Invalid

Because DNRC has limited appropriation authority to use for fire costs, OBPP is relying upon language in House Bill No. 2 (HB2) that states:

> State special revenue appropriations in item 6 may be used for firefighting costs. It is the intent of the legislature to replace any state special revenue expenditures with a general fund supplemental appropriation in the next legislative session.

According to Mr. Petesch, this language is invalid based upon a couple of different points. First, this language conflicts with existing statutes and would be invalid if challenged. His opinion points out that language in HB2 cannot amend substantive law. Since statute directs how state special revenue funds are to be used, this language is invalid.

The second point focuses on the language of "legislative intent" contained in HB2. Since it has been established that a legislature may not bind a future legislature to appropriate money (except through the creation of long-term debt), Mr. Petesch indicates that the narrative expressing "legislative intent" to replace state special revenue expenditures with a general fund supplemental appropriation in the next legislative session is "meaningless at best."

[1] For the convenience of the Committee, a copy of this opinion has been attached.

Statutory Restrictions on Proposed Funding Sources

If DNRC had sufficient cash within the four funds to meet cost obligations, the statutes that direct how funds will be spent do not allow all four funds to be used for firefighting costs. Mr. Petesch has summarized the four accounts as follows:

- Forestry – Fire Protection Taxes. The forest land fire protection account provided for in 76-13-209 MCA, is specifically authorized to be used for fire suppression costs.

- TLMD – Administration Account. Any use of the trust land administration account for firefighting costs that did not occur on state lands would violate section 77-1-108(1), MCA. Further, at the end of a fiscal year, funds would have to be reserved for the purpose of paying firefighting costs to avoid conflicting with the requirement of 77-1-108(3)[2].

- Forest Resources – Timber Sales. The use of money in the account for firefighting costs would violate the statutory requirement that the money in the account be used for timber sale preparation and documentation.

- Forest Resources – Forest Improvement. The use of money in this account for firefighting costs would violate the statutory restrictions on the use of the account.

Thus, as indicated by Mr. Petesch, DNRC is limited in the funding it can use to pay for fire suppression costs. Even if DNRC had available cash in these funds, only two of them could conceivably be used to pay for fire suppression costs.

General Fund Loan

Since DNRC does not have enough cash to pay their fire costs, OBPP has indicated that the Department of Administration will authorize a general fund loan to pay for fire costs. OBPP has further indicated that the general fund loan will be repaid with any supplemental appropriation given by the 2003 legislature.

Utilizing an inter-account loan with repayment based upon the supplemental appropriation of a future legislature has been determined by an Attorney General's opinion to be inappropriate. According to a 1988 Attorney General's opinion[3], Attorney General Greely determined that an interaccount loan may not be made to a state special revenue account when the borrower anticipates no income, other than the possibility of a supplemental appropriation sometime in the future, with which to repay the loan. According to the opinion, the reliance on the possibility of a supplemental appropriation does not meet the requirement of reasonable evidence of future income under the interaccount loan statute. Thus, it appears that obtaining a general fund loan under these circumstances would violate this opinion, which is binding as law on a state agency.

[2] Paragraph 3 states that "Unreserved funds remaining in the account at the end of a fiscal year must be transferred to each of the permanent funds in proportionate shares to each fund's contribution to the account as calculated in 77-1-109(3)."
[3] 42 A.G. Op. 123 (1988)

Despite an assertion by OBPP that the Attorney General's opinion doesn't apply because of changes made to statute since its rendering, a conversation with Mr. Petesch confirms that the statutory changes cited by OBPP do not change the applicability of the Attorney General's opinion. Therefore, agencies must still meet the "reasonable evidence of future income" standard that requires more than the "hope" of a supplemental imposed by the opinion.

It appears that the steps proposed by OBPP to obtain authority and funding for fire costs are problematic in that: 1) language was utilized that is contrary to substantive law and is probably meaningless; 2) it appears that there are statutory restrictions governing the use of the proposed state special revenue funds restricts their use for suppression costs; 3) an interaccount loan based upon the promise of a supplemental appropriation is inappropriate. Based upon the above analysis, it appears that DNRC has few options to fund fire costs.

An option to using questionable techniques to obtain the funding for fire costs is to utilize the Governor's emergency fund. According to 10-3-312 MCA, $12.0 million general fund is available as a Governor's emergency fund to pay for wildfire related costs and other emergencies. Most of the $3.5 fire suppression costs were incurred while Montana was under an emergency declaration. Therefore, these costs are eligible to be paid for with emergency dollars. The available balance in the Governors emergency fund is $4.3 million for the remainder of fiscal 2002 and fiscal 2003. Utilizing the fund for eligible fiscal 2002 fire costs would leave a balance of less than $1.0 million to fund emergencies in fiscal 2003.

OPTIONS FOR LFC ACTION

The committee may take one of three actions:

1) Inform the Governor that the committee does not raise any issues of statutory compliance with the request.
2) Inform the Governor of statutory compliance issues with the request.
3) Take no action. The Governor cannot approve or deny either request for 90 days if the committee does not provide a formal report.

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